No. 05-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES HUGH SCHUMPERT,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Georgia Court of Appeals erred when, in conflict with multiple courts, it treated *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), as having abrogated the proximate cause rule of *Davis* v. *Wolfe*, 263 U.S. 239 (1923), in cases arising under the Federal Employers' Liability Act, thereby overruling *sub silentio* decades of this Court's precedents.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern" or "NS") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Georgia.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The initial, unreported decision of the Court of Appeals of Georgia is available at 2004 WL 2538166 (Ga. Ct. App. Nov. 10, 2004), and is reproduced in the Petition Appendix ("Pet. App.") at 9a-16a. That court's amended opinion, which is the judgment for which review is sought, is reported at 608 S.E.2d 236, and is reproduced in the Petition Appendix ("Pet. App.") at 1a-8a. The order of the Georgia Supreme Court denying certiorari is reproduced at Pet. App. 20a.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on November 10, 2004, and reconsideration was denied and an amended opinion issued on December 8, 2004. Pet. App. 1a. The Georgia Supreme Court denied certiorari on June 30, 2005. *Id.* at 20a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306, are reproduced at Pet. App. 21a-23a.

STATEMENT OF THE CASE

In *Davis* v. *Wolfe*, 263 U.S. 239 (1923), this Court reconciled its prior precedents regarding the standard of causation

under the Federal Employers' Liability Act ("FELA"). It held that an employee cannot recover under FELA if the railroad's allegedly unlawful conduct "is not a *proximate cause* of the accident which results in his injury, *but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury.*" *Id.*, at 243 (emphases added).

The Georgia Court of Appeals has now declined to follow that rule in light of *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957). Pet. App. 7a. The lower court had no authority to trench upon this Court's exclusive prerogative to determine the continuing validity of its precedents. Moreover, the decision below is based upon a fundamental misconception of *Rogers* as having *sub silentio* overruled decades worth of this Court's precedents defining the federal causation rule under FELA. That misconception over the effect of *Rogers* is the source of a mature conflict among the federal courts of appeals and state supreme courts, and this Court should intervene to bring clarity to this critical issue of federal law. This Court has not squarely addressed FELA causation in the nearly 50 years since it decided *Rogers*, and this Court should not permit the division and confusion in the lower courts to persist further.

This conflict is particularly significant where FELA is concerned. FELA is the exclusive remedial scheme for practically all railroad workplace injuries. See 45 U.S.C. § 51. Because of FELA, there is no worker's compensation scheme for railroad employees. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994); *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 538-39 (1957) (Frankfurter, J., dissenting). Moreover, FELA broadly preempts state tort statutes that would otherwise apply to such injuries. *Mondou* v. *New York, New Haven & Hartford R.R.*, 223 U.S. 1, 55 (1912). Accordingly, the causation standard at issue here implicates nearly every case involving an employee's injury while employed by a railroad.

A. Statutory Background

Section 1 of FELA makes "[e]very common carrier by railroad ... liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of a FELA cause of action are determined by the common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949).

In addition to FELA, Congress enacted two railroad safety statutes during the late nineteenth and early twentieth centuries that regulate aspects of railroad operation and maintenance: (1) the Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701-20703, which mandates various safeguards for railroad locomotives and boilers; and (2) the Safety Appliance Act ("SAA"), *id.* §§ 20301-20306, which imposes similar requirements for designated safety devices.[1] Violations of the BIA and SAA are actionable under FELA. *Urie*, 337 U.S. at 188-89. A violation of either statute "suppl[ies] the wrongful act necessary to ground liability under the F.E.L.A.," leaving the plaintiff only to prove causation and damages. *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949).

B. Factual Background

Respondent Schumpert was employed as a train conductor by Norfolk Southern. Trial Transcript ("Tr.") 166. On August 20, 1999, Schumpert was assigned to move a train from Atlanta to Commerce, Georgia. *Id.* at 72, 180-81. Along the way, Schumpert and a utility brakeman, Debra Lusk, engaged in a switching operation in order to turn around certain cars on the train. *Id.* at 198-200. Schumpert alleges that he injured his back while replacing a "knuckle" that had fallen from a drawbar as a result of his co-worker Lusk's negli-

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[1] Those provisions were originally codified at 45 U.S.C. § 1 *et seq.*, but were subsequently recodified in Title 49.